

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL HAWLEY
Claimant

VS.

CONTINENTAL GRAIN COMPANY
Respondent

AND

CIGNA INSURANCE COMPANY
Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 187,615

ORDER

Claimant and the Kansas Workers Compensation Fund both appeal from an Award entered by Administrative Law Judge Robert H. Foerschler on August 23, 1995. The Appeals Board heard oral argument January 16, 1996.

APPEARANCES

Claimant appeared by his attorney, Kendra L. Walker of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Gary R. Terrill of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, J. Paul Maurin, III of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant asks for review of the findings and conclusions relating to the nature and extent of claimant's disability. The Administrative Law Judge found claimant has a fifteen percent (15%) permanent partial impairment but deducted seven percent (7%) of that impairment as preexisting in accordance with the provision of K.S.A. 44-501(c) and, therefore, awarded benefits based upon an eight percent (8%) permanent partial general disability. Claimant contends that K.S.A. 44-501(c) is unconstitutionally vague and

violates constitutional mandates relating to equal protection and due process. Claimant also argues that his functional impairment is higher than the fifteen percent (15%) and finally argues that the record does not support the finding that claimant had a preexisting impairment of seven percent (7%).

The Kansas Workers Compensation Fund disputes the assessment of one hundred percent (100%) of benefits awarded against the Fund. The Fund argues that the respondent has not proven it had knowledge of a preexisting impairment which constituted a handicap.

The respondent argues that the award is too high, that the claimant should be entitled, at most, to benefits based upon three percent (3%) permanent partial impairment. Respondent also challenges the assessment of three hundred fifty dollars (\$350.00) in unauthorized medical expense and points out that the claimant did not utilize unauthorized medical expense in this case.

Subsequent to the oral arguments, respondent submitted to the Appeals Board a letter dated February 17, 1996, in which respondent argues the Award should be limited to medical expenses only on the basis of K.S.A. 44-501(c) as construed in a recent Court of Appeals decision in Boucher v. Peerless Products, Inc., Docket Number 74,158 (1996). Respondent asserts that the record shows claimant continued to receive full wages at all times after his accident. This issue was not, however, raised before the Administrative Law Judge and will not be considered for the first time on appeal. Davis v. Joe Ward Construction Co., 197 Kan. 589, 419 P.2d 918 (1966); Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds and concludes:

- (1) The Appeals Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold that an Act of the Kansas Legislature is unconstitutional. Accordingly, the Board will interpret and enforce the provisions of K.S.A. 44-501(c) as enacted.
- (2) The Board finds claimant's work-related injury caused a fifteen percent (15%) permanent partial impairment. The Appeals Board further finds the respondent has failed to establish preexisting impairment to be deducted from that fifteen percent (15%). Claimant's benefits should, therefore, be awarded based upon a fifteen percent (15%) general body disability.

Claimant injured his low back on July 24, 1993 while lifting and placing a piece of sheet metal weighing about forty to fifty (40-50) pounds. He testified that he experienced a "low dull pop" and pain in his lower back. Although claimant continued to work for approximately one week, the pain continued and by the time he sought treatment, he was experiencing excruciating pain in his low back as well as pain in his upper buttocks. The respondent referred claimant to the Business and Industry Health Group for treatment. Claimant was treated by Dr. John W. Beeks beginning on August 2, 1993. X-rays taken at that time showed degenerative disc disease at L4-5 and L5-S1. Dr. Beeks diagnosed acute lumbar strain and prescribed physical therapy and medication. Dr. Beeks released claimant to return to work without restrictions on September 23, 1993. Dr. Beeks indicated claimant had no permanent partial impairment, but acknowledged that he does not use and is not familiar with the AMA Guides to the Evaluation of Permanent Impairment.

In contrast to Dr. Beeks' conclusion claimant testified that he continues to have pain in his lower back and sometimes feels a "dull electric shock" or "tingly numbness" in his upper buttocks area. Work with his hands extended above his head aggravates or increases the symptoms. Cold weather makes the pain worse. He has returned to the same job, but testified he has had to modify or alter the way he does his job. He does not bend at the back and instead kneels down and works off one knee. He usually obtains help in lifting heavy objects. He has had a scaffolding set up so his hands will not be above his head and he can work in a normal position. He obtains assistance in pulling cable or rope. When he becomes tired from standing or his back feels fatigued, he sits and rests.

Two other physicians testified regarding claimant's back condition and the extent of his disability. Dr. Michael Poppa testified on behalf of the respondent. Dr. Poppa had performed a preemployment physical on the claimant on behalf of respondent on June 29, 1990. He examined claimant at respondent's request in connection with the current workers compensation claim on February 27, 1995. Based upon those two examinations, Dr. Poppa testified that claimant currently has a ten percent (10%) permanent partial general body impairment. Dr. Poppa divided the overall rating and attributed seven percent (7%) to a disc lesion, two percent (2%) to decreased flexion and one percent (1%) to decreased extension. He also testified that seven percent (7%) of the overall ten percent (10%) preexisted the injury involved in this claim.

When the parties could not reach agreement regarding the extent of claimant's functional impairment, the Administrative Law Judge appointed Dr. Ernest H. Neighbor to conduct an independent medical examination. Dr. Neighbor, an orthopedic surgeon, examined claimant on September 27, 1994. He found, as did Dr. Poppa, a damaged intervertebral disc. Specifically, x-rays of the lumbar spine showed narrowing of L5-S1 and to a lesser extent narrowing at L4-5. Dr. Neighbor concluded claimant has a twenty-two percent (22%) permanent partial impairment to the body as a whole. Dr. Neighbor's rating included five percent (5%) rating for the damage to the intervertebral disc with an additional eighteen percent (18%) for loss of range of motion. He testified, as had Dr. Poppa, his rating was based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised).

As indicated above, the Board has concluded that the fifteen percent (15%) permanent partial impairment found by the Administrative Law Judge accurately reflects the extent of the claimant's impairment. This conclusion is reached by giving approximately equal weight to the two opinions of Dr. Poppa and Dr. Neighbor. The Board also considers the fifteen percent (15%) impairment to reasonably assess the residual impairment reflected in claimant's testimony and the findings by these two physicians.

The Appeals Board finds, on the other hand, that respondent has failed in its burden to establish that a preexisting impairment shall be deducted under K.S.A. 44-501(c). The injury in this case occurred July 24, 1993 and the claim is, therefore, governed by amendments which became effective July 1, 1993. Those include the provisions of K.S.A. 44-501(c) that the award be reduced by the amount of functional impairment determined to be preexisting. The amendments also include the provisions of K.S.A. 44-510e which require that functional impairment be based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). The ratings by Dr. Neighbor and Dr. Poppa were both based upon the AMA Guides. The Board concludes that the functional impairment to be deducted should also be based on the AMA Guides. The amendment defines functional impairment as loss of physiological capabilities based upon the AMA Guides. Functional impairment is then the element to be deducted.

The only testimony regarding preexisting functional impairment is that of Dr. Poppa. The evidence does not convincingly establish that his assessment of seven percent (7%)

preexisting impairment was, in fact, based upon AMA Guides. Dr. Poppa refers in describing the preexisting impairment to Page 80, Table 53, Subsection II-C. That section, according to Dr. Poppa's testimony, allows for a seven percent (7%) impairment of function for individuals with unoperated medically documented injury with a minimum of six (6) months of medically documented pain, or rigidity associated with moderate to severe degenerative changes. Dr. Poppa acknowledges that according to claimant's testimony there has not been a medically documented injury or six (6) months of medically documented pain and rigidity. In fact, claimant's testimony indicates he had not experienced significant symptoms to his low back prior to the injury in question in this case. He experienced symptoms in his neck and upper back when his automobile was rear-ended in 1992. He had some moderate pain in his mid back from a fall in 1982. Although Dr. Poppa's x-rays from 1990 reveals degenerative changes in the lumbar spine, the record does not establish preexisting functional impairment to the low back, based upon AMA Guides, prior to the injury of question in this case.

This conclusion is further supported by the testimony of Dr. Neighbor. Dr. Neighbor did not have the benefit of the 1990 x-rays but was asked hypothetically whether x-rays in 1990 showing degenerative disc disease with some narrowing, but no loss of range of motion and no complaint of pain would support an impairment rating under AMA Guides. Dr. Neighbor indicated that pursuant to AMA Guides his rating at that time would have been zero.

The Appeals Board finds claimant suffered a fifteen percent (15%) permanent partial impairment. Respondent has not established a preexisting functional impairment based upon AMA Guides.

(3) The evidence does not establish requisites for imposing liability on the Kansas Workers Compensation Fund and, more specifically, does not establish preexisting impairment which would have constituted a handicap in obtaining or retaining employment.

The evidence in the record relating to respondent's knowledge of claimant's preexisting condition is found in the preemployment physical conducted by Dr. Poppa. As previously indicated, that examination included x-rays. The x-ray showed "degenerative changes lumbar spine" with decreased space in L-5,S-1. Dr. Poppa did not, however, recommend any restrictions in claimant's work as a result of those x-ray findings. He testified that a person with those findings was at a greater risk for further injury, but that such person might or might not have such further injury. Dr. Poppa acknowledged he did not consider those findings a hinderance in claimant's obtaining employment with Continental Grain. Dr. Poppa did not, at that time, render an opinion that claimant had any functional impairment. Claimant's own testimony suggested that he did not have any significant symptomatology at that time which would hinder performance of his duties. On the basis of this evidence, the Appeals Board concludes that the evidence does not show a preexisting impairment which would constitute a handicap in obtaining or retaining employment. Accordingly the evidence does not warrant imposing liability on the Kansas Workers Compensation Fund. K.S.A. 44-567.

(4) The Appeals Board finds that unauthorized medical expense should not be assessed against the respondent. No evidence has been presented to suggest the claimant availed himself of the opportunity to utilize the unauthorized medical expense in this claim. Accordingly, the Award should be modified and no award of unauthorized medical expense is made.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated August 23, 1995 should be modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Michael Hawley, and against the respondent, Continental Grain Company, and the insurance carrier, Cigna Insurance Company, for an accidental injury sustained on July 27, 1993.

The claimant is entitled to 62.25 weeks for a 15% permanent partial general body disability award at the weekly rate of \$313.00 per week in the sum of \$19,484.25 which is to be paid in one lump sum less any amount previously paid.

Future medical treatment for the claimant for injuries compensated in this proceeding may be awarded upon a proper application and a hearing upon notice to all parties.

Costs of transcripts in the record are taxed against respondent and carrier as follows:

Metropolitan Court Reporters, Inc.	\$334.40
Hostetler & Associates, Inc.	\$346.90
Richard Kupper & Associates	\$489.75

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kendra L. Walker, Kansas City, Kansas
Gary R. Terrill, Overland Park, Kansas
J. Paul Maurin III, Kansas City, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director